

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

B. JAMES CAKE	:	CIVIL ACTION
	:	
v.	:	
	:	
PROVIDENT LIFE AND ACCIDENT	:	
INSURANCE COMPANY	:	NO. 98-4945

MEMORANDUM ORDER

Plaintiff claims that defendant has wrongfully withheld disability insurance benefits to which plaintiff was entitled and that defendant has wrongfully required plaintiff to continue paying premiums to maintain the insurance policies in force despite his disability. Plaintiff has asserted claims for breach of contract, for imposition of a constructive trust, for bad faith pursuant to 42 Pa. C.S.A. § 8371, for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq., and for infliction of emotional harm. Presently before the court is defendant's motion to dismiss plaintiff's constructive trust, unfair trade practice and emotional harm claims pursuant to Fed. R. Civ. P. 12(b)(6).

The pertinent factual allegations are as follow. Plaintiff was the insured under two disability policies issued by defendant. In the event plaintiff became "totally disabled," defendant was obligated to pay combined benefits of \$7,000 per month, starting 181 days after the onset of disability and continuing to the end of the disability or plaintiff's sixty-fifth birthday. The term "totally disabled" is defined in the

policies as an inability to perform the "substantial and material duties of [his] occupation."

Plaintiff was the chief financial officer and acting president of John A. Robbins Companies, a real estate company specializing in the management of shopping centers. Suffering from depression, he resigned on April 25, 1999. His depression grew worse after the resignation. In late September 1997, plaintiff became chief financial officer of Drexel Realty Co. His condition deteriorated. He was suffering from "anxiety, stress and an inability to concentrate." He resigned from Robbins on October 6, 1997, after eight days on the job. From that time, "plaintiff's mental illness has rendered him unable to perform the substantial and material duties of his occupation." Defendant did not reasonably investigate plaintiff's claim and has declined to pay him benefits.

Plaintiff does not oppose defendant's motion to dismiss the emotional harm claim and, in any event he has not remotely set forth a cognizable claim for intentional or negligent infliction of emotional distress.

A constructive trust is an equitable remedy and not a cause of action. See, e.g., Kaiser v. Stewart, 1997 WL 476455, at *19 (E.D. Pa. Aug. 19, 1997); Lerario v. Provident Life and Accident Ins. Co., 1996 WL 532491, at *4 (E.D. Pa. Sept. 20, 1996). It would appear that plaintiff clearly has a fully

adequate legal remedy for the wrongs he has alleged. Plaintiff concedes as much, but argues that he only intended this count serve as an alternative prayer for relief. A court may grant any relief which is shown to be appropriate. See, e.g., Old Republic Ins. Co. v. Employers Reinsurance Corp., 144 F.3d 1077, 1081 (7th Cir. 1998) (court should grant all appropriate relief even if not specifically requested by parties); Schumann v. Levi, 728 F.2d 1141, 1143 (8th Cir. 1984); Hamlin v. Warren, 664 F.2d 29, 30 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Sapp v. Renfro, 511 F.2d 172, 176 n.3 (5th Cir. 1975); Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60, 62-63 (2d Cir. 1963).

Nevertheless, if he wishes, plaintiff may amend his complaint to add a prayer for equitable relief in the form of a constructive trust.

Malfeasance or misfeasance is actionable under the Consumer Protection Law. Nonfeasance is not. See Horowitz v. Federal Kemper Life Ins. Co., 57 F.3d 300, 307 (3d Cir. 1995). An insurer's failure to pay the proceeds of an insurance policy is nonfeasance and accordingly is not actionable. Id.

In the course of denying a claim for coverage, however, an insurer may engage in conduct that constitutes malfeasance or misfeasance and which thus could be actionable under the Consumer Protection Law. See Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. 616, 620-21 (W.D. Pa. 1996) (allegation that post-loss

investigation was performed improperly states claim); Parasco v. Pacific Indem. Co., 870 F. Supp. 644, 648 (E.D. Pa. 1994)

(allegations that post-loss investigation was conducted in unfair manner and that insurer made misrepresentations regarding nature of its contractual obligations stated claim). Plaintiff's allegation that defendant "conducted an unreasonable investigation of plaintiff's claim" suggests more than a failure to investigate. Rather, it suggests that defendant undertook an investigation and performed it improperly. As such, the court cannot conscientiously conclude beyond doubt at this juncture that plaintiff will be unable to prove any set of facts on which he could prevail on his Consumer Protection Law claim. See Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

ACCORDINGLY, this day of January, 1999, upon consideration of defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. #3) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED IN PART** in that the claims for infliction of emotional harm and for a constructive trust are **DISMISSED**, and said Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.